Nos. 85-558, 85-559, and 85-560

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT E. O'CONNOR and GLADYS E. O'CONNOR,
Petitioners,
v.
UNITED STATES OF AMERICA

PAUL H. COPLIN and PATRICIA COPLIN,
Petitioners,
v.
UNITED STATES OF AMERICA

JACK R. MATTOX and MARIA MATTOX,
Petitioners,
v.
UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MOTION FOR LEAVE TO FILE POST ARGUMENT A SUPPLEMENTAL BRIEF FOR THE PETITIONERS AND SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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MOTION FOR LEAVE TO FILE POST ARGUMENT A SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Pursuant to Rule 35.5 of the Rules of this Court, petitioners move for leave to file after argument the accompanying brief to apprise the Court of the final enactment of the Tax Reform Act of 1986, Pub. L. No. 99-514, and "to analyze and argue as to the impact of" Section 1232(a) of the Act "on the questions pending before the Court." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 575 (6th ed. 1986). See *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983); *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983).

On October 22, 1986, President Reagan signed into law the Tax Reform Act, which contains a provision relevant to this case. Section 1232(a) provides:

> "Nothing in the Panama Canal Treaty (or in any agreement implementing such Treaty) shall be construed as exempting (in whole or in part) any citizen or resident of the United States from any tax under the Internal Revenue Code of 1954 or 1986. The preceding sentence shall apply to all taxable years whether beginning before, on, or after the date of the enactment of this Act (or in the case of any tax not imposed with respect to a taxable year, to taxable events after the date of enactment of this Act)."

Obviously, the provision is intended to eliminate the claim of petitioners, and others like them, that Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty, September 7, 1977, T.I.A.S. No. 10030, exempts U.S. employees of the Panama Canal Commission from U.S. taxes on Commission-related work. Because the statute did not become effective until after the oral argument in this case,* petitioners have had no opportunity to analyze for the Court the effect of the statute on the issues presented. Accordingly, petitioners submit that their motion for leave to file a post-argument supplemental brief should be granted.

* When petitioners filed their Reply Brief, the Tax Reform Act in the main had passed both Houses of Congress. Because the bill was still subject to technical changes, it was not ready for the President's signature prior to the argument on October 14, 1986. Petitioners waited until it was clear that no new law would be in effect before filing their reply. Petitioners at that time decided it was unnecessary, and indeed, unwarranted to analyze the effect of a law that was not finalized. Accordingly, this is the first appropriate occasion for petitioners to discuss the relevance of Section 1232(a).

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

On October 22, 1986, the President signed into law the Tax Reform Act of 1986. Pub. L. No. 99-514. Prior to the argument on October 14, 1986, the Solicitor General, with petitioners' consent, lodged copies of Section 1232(a) of the Tax Reform Act of 1986 as passed by Congress, which is relevant to this case.[1] Petitioners are filing this Supplemental Brief to discuss what, if any, effect, the new provision should have on the Court's disposition of this case.

1. The easiest and most appropriate course for the Court to follow would be to ignore the new provision for the purpose of deciding the questions presented in the petitions for writs of certiorari. The Court can, and should, decide what the United States and Panama intended in 1977 when they finally agreed upon the exact language in Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty. If the Court holds that the plain language, structure and negotiating history of the Agreement demonstrate that United States' citizen employees of the Panama Canal Commission were exempted from U.S. taxes, then it can remand the case to the Claims Court for a determination of what effect, if any, Section 1232(a) has on the outcome of these cases.[2] Moreover, the Claims Court would clearly

[1] Section 1232(a) provides:

"Nothing in the Panama Canal Treaty (or in any agreement implementing such Treaty) shall be construed as exempting (in whole or in part) any citizen or resident of the United States from any tax under the Internal Revenue Code of 1954 or 1986. The preceding sentence shall apply to all taxable years whether beginning before, on, or after the date of the enactment of this Act (or in the case of any tax not imposed with respect to a taxable year, to taxable events after the date of enactment of this Act)."

The Solicitor General also lodged copies of the portions of the House, Senate and Conference Reports relevant to Section 1232(a).

[2] If the Court holds that, contrary to the plain language of Article XV, the two nations only intended to exempt Panamanian taxes, then the Court would have no occasion to pass on the effect of Section 1232(a).

be a more appropriate forum for the parties to litigate due process claims petitioners would raise if the government would urge the Court to apply the provision retroactively. See page 6 *infra*.

At oral argument, the government's attorney discussed the relevant provision in the bill simply as an indication of what Congress now believes the Agreement provided. Of course, used in that way, the new statute is completely irrelevant. Statements of a subsequent Congress concerning the intent of previously enacted laws or treaties are entitled to no weight in interpreting the earlier law. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958).

It is, however, noteworthy that both the House and the Senate expressly acknowledged that the reading of the Agreement by the Eleventh Circuit in *Harris* v. *United States*, 768 F.2d 1240 (11th Cir. 1985), petition for cert. pending, No. 85-1011, which directly supports petitioners' interpretation, seemed to be consistent with the evidence before that court, which included everything before this Court except for the Panamanian Note. S. Rep. No. 99-313, 99th Cong., 2d Sess. 386 (1986); H.R. Rep. No. 99-426, 99th Cong., 1st Sess. 428 (1985). Thus, both Houses recognized the merit of the Eleventh Circuit's interpretation based on the language, structure and negotiating history of Article XV.

Congress, however, concluded that in light of the notorious diplomatic Note "Panama has confirmed the United States' explanation that the exemption was intended to apply solely to Panamanian taxes." S. Rep. No. 99-313, *supra* at 386; H.R. Rep. No. 99-426, *supra* at 427. But that Note, which the government refused to obtain or supply to the Claims Court, is entitled to no weight in

this litigation. *E.g.*, Pet. Reply Br. 11-16. Thus, Congress' construction of the Agreement, embodied in Section 1232(a), completely ignores the rules of interpretation that courts must follow.[3] Accordingly, as evidence of the meaning of the Agreement, Congress' recent action is simply beside the point.

2. If the Court feels obliged, because of the clear retroactive language used by Congress, to consider the effect of Section 1232(a) in this litigation, then it should declare the provision, literally read, to be an unconstitutional invasion by the legislative branch of powers reserved to the judiciary in the U.S. Const. Art. III.[4]

Article III vests all judicial power in this Court and all lower federal courts Congress chooses to create. Congress is invested with no judicial power and therefore can only restrict a federal court's power to exercise its judicial function by restricting its jurisdiction; Congress cannot dictate the outcome of specific cases. See *United States* v. *Klein*, 80 U.S. (8 Wall.) 128 (1871). Section 1232(a) purports to do *precisely* what this Court in *United States* v. *Klein* held was beyond Congress' legislative power. In *Klein*, this Court considered the effect of a congressional statute which declared "in substance that no pardon, . . . shall be admissible . . . to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate

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[3] The only other material cited by the Reports is some of the legislative history in the Senate during the Treaty ratification process, which petitioners have already shown is wholly inadequate as a basis for disregarding the plain meaning of an international agreement. Pet. Reply Br. 7-8.

[4] Article III, Section 1 provides in pertinent part:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

court on appeal." *Id.* at 143. The Court struck down the law as applied and held that Congress could not "prescribe a rule for the decision of a cause in a particular way" without passing "the limit which separates the legislative from the judicial power." 80 U.S. at 146, 147. What made the statute particularly offensive was that it required the Court to decide the case before it in the government's favor. 80 U.S. at 147; *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 405 (1980).

This is exactly what Section 1232(a), if applied to this case, requires. The language of the statute could not be aimed more clearly at the judicial function; the Court is prohibited from "*construe[ing]*" the Agreement with Panama to provide any exemption from United States' taxes. Moreover, the legislative history plainly indicates that the Congress was fully aware of the on-going litigation. Indeed, the Senate expressly recognized "the litigation rights of persons under current law" and therefore proposed that Section 1232(a) be applied "only to future years." S. Rep. No. 99-313, *supra* at 387. Instead of disavowing the Agreement prospectively, which the Senate tried to do, Congress has attempted to dictate the outcome of this case and has done so to insure that the government wins this case and all others pending on this issue in the lower federal courts. Under *Klein*, this clearly violates Article III.[5]

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[5] Whether the constitutionally suspect sentence retroactively applying the provision should be severed from the first, which merely declares how the Agreement should be construed, depends upon Congress' intent. *See, e.g., Carter* v. *Carter Coal Co.*, 298 U.S. 238, 316 (1936). There is no evidence that Congress intended actually to abrogate the Agreement if it was misinterpreting it. Instead, the provision was described by both Houses as a "clarification." H.R. Rep. No. 99-426, *supra* at 428; S. Rep. No. 99-313, *supra* at 387.

Also, Congress has a much stronger financial interest in eliminating the exemption retroactively. Since 1979, the number of U.S. citizen employees has steadily dropped (a total reduction of 44.1%); no new U.S. citizens are being hired permanently and the remain-

3. Alternatively, Congress' attempt retroactively to abolish petitioners' rights created by an agreement with another country raises a serious due process issue. Clearly, under petitioners' interpretation of Article XV, Panama and the United States compromised and conferred upon petitioners and other U.S. employees of the Commission a bi-national exemption against income taxes for Commission-related work. While legislative action is presumed not to create contractual rights, the presumption is rebuttable. *Wisconsin & Mich. Ry. Co.* v. *Powers*, 191 U.S. 379, 386 (1903). There is certainly a serious question whether Congress can extinguish petitioners' rights under the Agreement, which are akin to the rights of a third party beneficiary to a contract, without a better reason than the government's unilateral desire to increase revenues. Unlike the Article III issue, however, the due process problem is a complicated one that would require additional factual development. Accordingly, the due process issue would necessarily require a remand to allow the Claims Court to evaluate fully, and in the first instance, the nature of petitioners' interests and the requirements of the Due Process Clause.

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ing U.S. citizens face certain termination from employment by the end of the century under the mandate of the Treaty. It therefore seems unlikely that Congress would add to the burden of these employees if it cannot eliminate the exemption retroactively.

CONCLUSION

For the reasons stated herein, the Court should decide these cases on the basis of Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty without regard to the recently enacted Section 1232(a) of the Tax Reform Act of 1986.

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